Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Verizon Telephone	)	
Companies for Forbearance under	)	
47 U.S.C. § 160(c) from Title II and	)	WC Docket No. 04-440
Computer Inquiry Rules with Respect to	)	
Their Broadband Services	)	

REPLY COMMENTS OF SBC COMMUNICATIONS

SBC Communications, Inc. (SBC) filed comments on February 8, 2005, supporting the above-captioned petition for forbearance filed by the Verizon Telephone Companies (collectively, Verizon).[1] As Verizon's petition makes abundantly clear, the broadband marketplace is intensely competitive and the Commission's continued imposition of legacy common carrier regulations on the broadband services offered by local telephone companies is arbitrary and capricious – especially considering that the market-leading cable broadband providers are subject to none of these legacy regulations.

Some of the parties opposing Verizon's petition allege, however, that the broadband marketplace is not competitive and legacy common carrier regulations are still needed to prevent anti-competitive behavior. Many of these parties echo comments already raised in response to a comparable broadband forbearance petition filed by BellSouth Telecommunications, Inc (BellSouth).[2] Thus, in support of Verizon's petition, SBC respectfully refers the Commission to the reply comments it previously filed in response to BellSouth's forbearance petition (attached

[1] SBC Comments, WC Docket No. 04-440 (Feb. 8, 2005) (SBC Comments).

[2] Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements, WC Docket No. 04-405 (Oct. 27, 2004).

as Appendix A).[3] SBC also respectfully refers the Commission to the reply comments it previously filed in response to the Commission's *Fourth 706 Inquiry*, in which SBC addressed the competitive nature of the broadband marketplace and the urgent need for the Commission to level the regulatory playing field between cable broadband providers and their local telephone company competitors (attached as Appendix B).[4]

For all of the reasons stated in SBC's submissions in this docket, the Commission should grant Verizon's petition for forbearance.

Respectfully Submitted,

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[3] SBC Reply Comments, WC Docket No. 04-405 (Jan. 28, 2005).

[4] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Notice of Inquiry, FCC 04-55 (released March 17, 2004) (*Fourth 706 Inquiry*); SBC Reply Comments, GN Docket No. 04-54 (May 24, 2004).

Appendix A

Before the
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In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 04-405
Application of *Computer Inquiry* and Title II	)	
Common-Carriage Requirements	)	

COMMENTS OF SBC COMMUNICATIONS INC.

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I. INTRODUCTION AND SUMMARY

SBC Communications, Inc., and its affiliated companies (collectively, SBC) submit the following reply comments to address two general arguments raised by opponents of BellSouth's above-captioned petition for forbearance.[1]

First, some commenters argue that the Commission should deny BellSouth's petition because the broadband marketplace is not competitive and the Commission cannot rely on market forces to protect against anti-competitive behavior. But contrary to these dubious assertions, there is ample evidence of strong competition in the market for broadband services. In fact, it is precisely because of this intense competition that legacy common carrier regulations and *Computer Inquiry* requirements are not warranted for wireline broadband services.

Second, some commenters attempt to draw purported economic and technical distinctions between wireline broadband services and cable broadband services in an effort to justify the disparate regulatory treatment between these two services. These purported distinctions are entirely baseless and cannot excuse the Commission's failure to level the regulatory playing field between cable broadband providers and wireline broadband providers -- a failure that is tremendously disappointing given the two major wireline broadband rulemaking proceedings (the *Non-Dominance NPRM* and the *Wireline Broadband NPRM*) that have been pending at the Commission for *three years*.[2] Indeed, in light of this failure, the Commission should immediately grant BellSouth's petition and eliminate the outmoded and unwarranted legacy regulations that are impeding full and fair competition in the broadband marketplace.

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[1] Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160(c) From Application of *Computer Inquiry* and Title II Common-Carriage Requirements, WC Docket No. 04-405 (Oct. 27, 2004) (BellSouth Petition).

[2] *See* SBC Comments at 1-2 (referencing *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Non-Dominance NPRM*); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*)).

II. DISCUSSION

A. Despite Some Commenters' Claims to the Contrary, the Broadband Market is Highly Competitive.

Some opponents of BellSouth's petition claim that the regulations from which BellSouth seeks forbearance are still necessary because the market for broadband services is not competitive. They assert that the broadband market is essentially limited to two providers, cable companies and incumbent telephone companies, and therefore the Commission cannot rely on market forces to ensure the widespread deployment of affordable broadband.[3] Predictably, they allege that "more regulation" is the only way to promote broadband competition.[4] These claims, however, are squarely at odds with the competitive realities of the broadband marketplace, the Commission's own findings about broadband competition, and the conclusions of the D.C. Circuit.

There is no serious dispute that cable providers continue to maintain a commanding lead in the market for broadband services. The Commission's own data show that, as of June 2004, there were roughly 32.5 million high-speed lines in the U.S. (at least 200 Kbps in one direction), and cable companies controlled 18.6 million (57 percent) of those lines.[5] By contrast all four RBOCs combined provided service to only 10.3 million high-speed lines (32 percent of the market).[6] Cable's commanding lead in the market for "advanced services" (at least 200 kbps in

[3] *See* ALTS Comments at 4; AT&T Comments at 34-38; FISPA Comments at 33-36; Local Government Coalition at 11; Vonage Comments at 13.

[4] *See* Bayou Internet Comments at 2 ("BellSouth needs more regulation."); FISPA Comments at 6 (common carrier regulations and *Computer Inquiry* requirements "should be extended to other broadband platforms and enforced with vigor").

[5] *High-Speed Services for Internet Access: Status as of June 30, 2004*, Wireline Competition Bureau, FCC, at Table 1, Chart 2 (Dec. 2004) (*FCC December 2004 Broadband Data Report*).

[6] *Id*. at Table 5.

both directions) is far more striking: 17.6 million cable modem lines (75 percent of the market) compared to 5.2 million ADSL and "other wireline" lines (22 percent of the market).[7] As BellSouth and others have made clear, if, as the Commission has already decided, legacy Title II common carrier regulations and the *Computer Inquiry* requirements are not necessary for the market-leading cable broadband industry, then they are certainly not necessary for the second-place wireline broadband industry.[8]

Despite the irrefutable logic of BellSouth's argument, some commenters allege that the broadband market is merely a duopoly between cable companies and incumbent telephone companies, and the Commission must maintain its legacy wireline regulations to guard against anti-competitive behavior.[9] But all that these commenters offer in support of their arguments is a superficial analysis of broadband market *share* without any real consideration of broadband market *behavior*. Indeed, to stay competitive with cable companies and other broadband providers, SBC and other wireline providers have been *lowering* the price of DSL Internet access service and rolling out higher-speed broadband offerings.[10] At the same time, satellite providers, licensed wireless providers offering both fixed and mobile services, providers of unlicensed

[7] *Id.* at Table 2, Chart 4.

[8] *See* BellSouth Petition at 13-15; SBC Comments at 5-9.

[9] *See supra* note 3.

[10] *See* SBC Reply Comments, GN Docket No. 04-54 (filed May 24, 2004) at 3-8. *See also* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c), WC Docket No. 04-416 (Nov. 10, 2004) at 16-17 (explaining that demand for xDSL service is elastic). SBC's separate affiliate, SBC Internet Services (SBCIS), is the entity that actually provides DSL Internet access service to consumers. SBCIS purchases wholesale DSL transport from SBC Advanced Solutions, Inc. (ASI), which is SBC's advanced services separate affiliate. For the sake of simplicity, however, we refer to SBC as the provider of DSL Internet access service in these comments.

wireless services (such as Wi-Fi), and broadband over powerline (BPL) companies are all offering innovative new broadband services that compete for consumer dollars.[11]

In fact, the very same commenters that decry the lack of competitive offerings in the broadband marketplace are now proudly touting competitive alternatives to ILEC broadband services. MCI, for example, claims that without the continued imposition of Title II common carrier regulations and the *Computer Inquiry* requirements, "ISPs would have no alternatives for underlying transmission services."[12] But just this month MCI announced that it "is expanding its Internet Broadband portfolio to include high-speed cable access," and through its relationship with New Edge Networks, "MCI is making available asymmetric cable service from Charter, Cox Communications and Time Warner Cable."[13]

Similarly, Earthlink argues for the continued imposition of common carrier regulations because "competition is not coming from multiple sources and technologies."[14] Yet the very same Earthlink offers its information services over a variety of broadband platforms today, including cable, DSL, satellite, fixed wireless, and mobile wireless.[15] Earthlink has also

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[11] *See Broadband Competition: May 2004* (attached as Appendix A to Competition in the Provision of Voice over IP and Other IP-Enabled Services, WC Docket No. 04-36, jointly filed May 28, 2004 by BellSouth, Qwest, SBC and Verizon) (describing intense competition for broadband services in the mass market and in the enterprise market); *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress, FCC 04-208 at 14-24 (Sept. 9, 2004) (*Fourth 706 Report*).

[12] MCI Comments at 10.

[13] *MCI Adds Cable to Internet Broadband Mix, Companies Can Utilize One Provider to Reach 90 Percent of U.S. Business Locations*, MCI Press Release (Jan. 11, 2005).

[14] Earthlink Comments at 21.

[15] *See* "Earthlink High Speed" web site, www.earthlink.net/home/broadband (offering "Earthlink Cable," "Earthlink DSL," "Earthlink Basic DSL," "Earthlink Satellite"); *Earthlink Partners with DigitalPath Networks to Offer Wireless Broadband in Northern California*, Earthlink Press Release (May 19, 2004) ("By partnering with DigitalPath, Earthlink is once again demonstrating that it will take advantage of multiple service platforms to best meet the high speed needs of its customers."); *Earthlink to Become First ISP to Offer Wireless Data and Voice Solutions*, Earthlink Press Release (March 22, 2004) ("Earthlink has served the data-focused mobile professional for the past four years with wireless services on a variety of platforms, utilizing several data networks including Mobitex, ReFLEX, DataTAC and CDMA 1xRTT.").

announced a trial with a Broadband over Power Line (BPL) provider and has partnered with an equipment vendor to offer a home networking service.[16] Thus, despite its rhetoric to the contrary, Earthlink appears to be quite successful in obtaining commercially-negotiated arrangements to offer its services over a wide range of networks and technologies.

While there seems to be a disconnect between some opposing commenters' words and deeds, this much is clear: since the Commission first began formally collecting broadband data in 1999, broadband speeds have increased, broadband prices have come down, new broadband providers have entered the market, and broadband services are being offered to ever greater numbers of residential and business customers.[17] The Commission itself recently cited "the existence of numerous emerging broadband competitors" and observed that "actual and potential intermodal competition" informs competitive decision-making in the marketplace.[18] The Commission also stated that "[t]he competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices."[19]

It is precisely because of these competitive pressures in the broadband marketplace that the Commission should reject arguments by FISPA and others that the *Computer Inquiry* requirements should be maintained and "private carriage" should be prohibited for broadband

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[16] *Progress Energy and Earthlink Testing Broadband Over Power Lines with Area Customers*, Earthlink Press Release (Feb. 18, 2004); *Earthlink to Offer Linksys Wired and Wireless Networking Products to High Speed Internet Subscribers*, Earthlink Pres Release (Dec. 17, 2003).

[17] *See supra* note 11; *FCC December 2004 Broadband Data Report* at Table 2, Chart 3, Table 6, Chart 10.

[18] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 01-338, Memorandum Opinion and Order, FCC 04-254 ¶22 (released Oct. 27, 2004).

[19] *Fourth 706 Report* at 13.

services.[20] FISPA asserts that if BellSouth and other ILECs are given the freedom and flexibility to provide their broadband services through private carriage, rather than under legacy common carrier regulations, they will have "no incentive to fairly negotiate private contractual arrangements" and "could stonewall such requests by offering onerous and unconscionable rates, terms and conditions."[21] According to FISPA, "government regulation is *required* to balance the competing interests of public need . . . and private rights."[22]

But FISPA's call for continued regulation is entirely misplaced in today's competitive broadband marketplace and completely ignores this Commission's strong desire to let market forces, not government regulations, drive business decisions and service offerings. Indeed, when the Commission adopted the *Computer Inquiry* requirements more than two decades ago for the "one-wire world" existing at that time, it also pointed out that "the advent and growth of competition in a particular market *eliminates the need for continued regulation*."[23] The Commission more recently expressed this same preference for market forces over regulation when it stated that:

> Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest.[24]

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[20] FISPA Comments at 5-10. *See also* ALTS Comments at 6-10; Earthlink Comments at 18-22; ITAA Comments at 9-17.

[21] FISPA Comments at 6, 9.

[22] FISPA Comments at 7 (emphasis added).

[23] *See Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry)*, CC Docket No. 81-893, Report and Order, 95 F.C.C.2d 1276 ¶ 38 (1983) (emphasis added).

[24] A*ccess Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 ¶ 263 (1997).

Indeed, the Commission has *already* chosen to rely on market forces, rather than regulations, to dictate behavior in the broadband marketplace. Almost three years ago, the Commission determined that private carriage is appropriate for the market-leading cable broadband providers and waived the *Computer Inquiry* requirements for cable broadband service.[25] And just this month in a brief to the Supreme Court, the Commission and the Department of Justice pointed out that common carrier regulation of cable modem service "could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas. . . . Imposition of those obligations on cable operators could also discourage investment in facilities by competing Internet access providers."[26] It would thus be entirely arbitrary and capricious for the Commission to exempt cable modem service from common carrier regulations and *Computer Inquiry* requirements without taking the same action for the second-place wireline broadband providers.

But if there was any doubt about the sufficiency of competition in the broadband marketplace, the D.C. has Circuit has *already* said that it "agree[s] with the Commission" that there is "robust intermodal competition" between cable providers and incumbent telephone companies in the provision of broadband.[27] In light of this robust intermodal broadband competition, it is not surprising that the D.C. Circuit also admonished the Commission that "[i]n

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[25] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 ¶¶ 45-55 (2002) (*Cable Modem Declaratory Ruling*)

[26] Brief for the Federal Petitioners, *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, Nos. 04-277 and 04-281, at 31 (Jan. 18, 2005).

[27] *USTA v. FCC*, 359 F.3d 554, 582. Indeed, the court concluded that "even if all CLECs were driven from the broadband market, mass market consumers would still have the benefits of competition between cable providers and ILECs." *Id*.

competitive markets, an ILEC can't be used as a piñata."[28] Yet, this is precisely what the Commission is doing by continuing to impose outmoded, legacy regulations on ILEC broadband services after having effectively exempted cable broadband from any such regulations. The Commission should immediately rectify its asymmetrical, heavy-handed regulatory treatment of ILEC broadband services by completing its long overdue wireline broadband rulemakings[29] and granting BellSouth's forbearance petition.

B. The Commission Should Reject Commenters' Attempts to Create Distinctions Where None Exist Between Wireline Broadband and Cable Broadband.

In an unconvincing attempt to maintain the Commission's biased regulatory regime for broadband, some commenters have tried to manufacture "historical" distinctions between wireline broadband services and cable broadband services that would purportedly warrant disparate regulatory treatment. But there are absolutely no differences -- historical or otherwise -- between wireline broadband and cable broadband that could possibly justify subjecting the second-place local telephone companies to *greater* regulatory burdens than the first-place cable companies.

ALTS, for example, claims there are "historical differences" between wireline and cable broadband services that "require different regulatory treatment."[30] One of these key differences, according to ALTS, is that "the telephone network was funded by ratepayer dollars under a governmentally sanctioned monopoly, while the cable broadband network was largely built on risk capital."[31] Thus, ALTS asserts, "there are compelling reasons to continue to regulate

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[28] *Id.* at 573.

[29] *See* SBC Comments at 1-2; 5-9.

[30] ALTS Comments at 5.

[31] ALTS Comments at 5. *See also* FISPA Comments at 31.

wireline broadband service providers as common carriers, regardless of how providers of cable modem services are categorized."[32]

ALTS' argument is nothing more than a classic bait-and-switch. ALTS first sets out the "bait" by describing alleged differences between wireline *telephone* networks and cable broadband networks. ALTS then executes the "switch" by implying, without a shred of support, that those same differences are present between wireline *broadband* services and cable broadband services. But ALTS' attempt to equate wireline broadband services with wireline telephone networks is pure fallacy. While many legacy telephone networks were built under rate-of-return regulations that offered the potential to earn a certain level of profit, ALTS completely fails to acknowledge that today's wireline telephone networks are, in fact, being built and maintained with risk capital. Indeed, all of the deployment, upgrades and maintenance of BOC wireline telephone networks over the last fifteen years occurred after the Commission's 1990 decision to replace rate-of-return regulation with price cap regulation for the BOCs.[33] Moreover, modern wireline *broadband* networks were first deployed on a significant scale in the late 1990's, well *after* the Commission had already ended rate-of-return regulation for the BOCs. Thus, whatever historical economic differences may (or may not) exist between legacy rate-of-return telephone networks and cable broadband networks, no such differences exist between wireline broadband networks and cable broadband networks.

In an equally fallacious line of reasoning, some commenters suggest that there are technical differences between wireline networks and cable networks that justify the continued

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[32] ALTS Comments at 6.

[33] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990). *See also Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 ¶¶ 13-17 (2000) (comparing rate-of-return regulation to price cap regulation).

imposition of Title II common carrier regulations and *Computer Inquiry* requirements. According to ITAA for example, under the *Computer Inquiry* requirements, "ILEC-provided information services" were designed so that the underlying transmission capacity in the ILEC networks could be made available to third parties, while cable systems "were designed to provide one-way transmission of multi-channel video programming" and "historically have not been required to provide transmission service to others." [34] Thus, ITAA argues, "even if the Commission does not extend the *Computer II* unbundling obligations on cable-provided information services, it should retain those obligations for ILEC-provided information services."

But ITAA's argument puts the cart before the horse. There was nothing inherent in legacy wireline technology that enabled the BOCs to offer the transmission component of their information services to third parties. Rather, the Commission *ordered* the BOCs to perform "radical surgery" to make that transmission capacity available to third parties.[35] Thus, the purported "technical" distinction that ITAA and others attempt to draw between wireline broadband and cable broadband is not a technical distinction at all. Instead, it is a legacy *regulatory* distinction that forced the BOCs, at great expense and effort, to design their networks to meet the Commission's requirements.[36] Moreover, the original factual predicate for the *Computer Inquiry* requirements -- "a one-wire world" -- no longer exists.[37] As explained above, today's broadband marketplace is highly competitive and there is simply no reason to impose the

[34] ITAA Comments at 13-14. *See also* ALTS Comments at 5.

[35] *Cable Modem Declaratory Ruling* ¶ 43 (describing as "radical surgery" the *Computer Inquiry* process of extracting a telecommunications service from every information service and making it available as a stand-alone offering regulated under Title II).

[36] If faced with these same regulatory requirements, there is nothing to suggest that cable companies could not develop the same technical capabilities in their networks.

[37] *Non-Dominance NPRM* ¶ 5.

Computer Inquiry requirements on any broadband provider, least of all the second-place wireline broadband providers.

III. CONCLUSION

For the forgoing reasons, the Commission should grant BellSouth's petition for forbearance.

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Appendix B

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In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	GN Docket No. 04-54
Capability to All Americans in a Reasonable	)	
and Timely Fashion, and Possible Steps	)	
to Accelerate Such Deployment	)	
Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

I. INTRODUCTION AND SUMMARY

SBC Communications, Inc. (SBC) submits the following reply comments in response to the Commission's fourth inquiry concerning the deployment of broadband to all Americans pursuant to section 706 of the Telecommunications Act of 1996.[1] In our initial comments, we explained in detail that the market for broadband services in the U.S. is highly competitive, providing consumers with a variety of broadband service options, in terms of both speed and price.[2] We further explained that, notwithstanding this competition, cable companies still dominate the overall U.S. market for broadband services.[3] We also showed that, despite their second-place status in the market, incumbent telephone companies unfairly remain the most

[1] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Notice of Inquiry, FCC 04-55 (released March 17, 2004) (*Fourth 706 Inquiry*). In these comments, SBC uses the term "broadband" to refer collectively to both "high-speed services" and "advanced services" as the Commission defines those terms, unless otherwise specified. In addition, because the Commission has traditionally focused on residential and small business customers in its section 706 inquiries, SBC's comments are directed primarily to addressing issues that affect those market segments, unless otherwise noted.

[2] SBC Comments at 7-11.

[3] SBC Comments at 10-11.

heavily regulated broadband providers.[4] Finally, we argued that the surest way for the Commission to satisfy its Congressionally-mandated obligation to encourage investment in broadband networks is to level the regulatory playing field between cable companies and telephone companies by expeditiously completing several long-pending wireline broadband proceedings in a fair and balanced manner.[5]

While there is strong support in the record for these positions -- especially the assertions that the broadband market is competitive[6] -- AT&T and MCI attempt to spin a much more pessimistic story about the status of the broadband marketplace, which quite predictably casts incumbent telephone companies as villains and suggests that ever more regulation is needed to incent the deployment of competitively-priced broadband services. But while such a story may make good copy for a public relations campaign, it has absolutely no basis in reality.

As discussed below, SBC has been aggressively responding to competitive pressure from cable companies and other broadband providers by, among other things, *lowering* the price of our DSL Internet access service and boosting broadband subscribership.[7] This is precisely the type of competitive response that Congress, the President, and the Commission have been clamoring for. Thus, the Commission should resist the call from some commenters for a retreat to monopoly-era regulation of incumbent telephone company broadband services, which would only stifle the competition that is beginning to flourish in the broadband marketplace. Instead, the Commission should seek to foster even greater competition by fully and finally resolving its

[4] SBC Comments at 11-15.

[5] SBC Comments at 16-22.

[6] *See* Comcast Comments at 6-13; United States Telecom Association Comments at 4-5; Verizon Comments at 6-16, Exhibit A, Broadband Competition: Recent Developments March 2004 (*Broadband Competition Update*).

[7] SBC's separate affiliate, SBCIS, is the entity that actually provides DSL Internet access service to consumers. SBCIS purchases wholesale DSL transport from Advanced Services, Inc. (ASI), which is SBC's advanced services separate affiliate. For the sake of simplicity, however, we refer to SBC as the provider of DSL Internet access service in these comments.

pending wireline broadband proceedings and providing the regulatory stability needed to encourage investment in the next generation of broadband networks and services.

II. NOTWITHSTANDING THE CLAIMS OF SOME COMMENTERS, THE U.S. BROADBAND MARKETPLACE IS HIGHLY COMPETITIVE.

Despite substantial evidence of broadband competition in the record, some commenters assert that there is no significant competition in today's broadband marketplace and there are few viable prospects for competition in the near future. AT&T, for example, argues that there is a "lack of pervasive broadband competition."[8] And MCI goes so far as to claim, without any factual support, that the Commission's decisions have "eliminated broadband competition."[9]

But as SBC and others showed in their initial comments, these pessimistic claims cannot be reconciled with marketplace realities. In fact, the market for broadband services is intensely competitive. Cable companies and telephone companies are fiercely competing with each other in a heated race to sign-up broadband subscribers as quickly as possible.[10] That competition has helped drive the wider availability of higher-speed services at lower prices.[11] At the same time, there is also a wide array of other broadband offerings available in the market today. As Verizon and Comcast demonstrate in great detail in their comments, a variety of providers are currently offering intermodal broadband services, including satellite broadband service, fixed wireless broadband service, mobile wireless broadband service, and powerline broadband service.[12] And these are not just trials, but actual commercial deployments as well.

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[8] AT&T Comments at 9.

[9] MCI Comments at 11.

[10] *See Broadband Competition Update* at 1-8 (providing a detailed analysis of cable company and telephone company broadband offerings); Comcast Comments at 2-9.

[11] *See Broadband Competition Update* at 1-8.

[12] *See Broadband Competition Update* at 13-24; Comcast Comments at 9-14.

Moreover, AT&T and MCI themselves are offering broadband services to millions of Americans. Indeed, just this month, AT&T touted its "aggressive nationwide rollout" of DSL service and the success it has had in entering new markets through its line splitting arrangement with Covad.[13] Under this arrangement, "AT&T bundles its DSL Service, provided in part through the Covad network, with AT&T local and long-distance services, offering consumers the advantage of a single, convenient telecommunications package. Launched in early 2003, AT&T now offers bundled DSL in a total of 26 states."[14] A similar line splitting arrangement with Covad enables MCI "to provide high-speed DSL Internet service for MCI's Neighborhood HiSpeed and Business Complete HiSpeed service. . . . Through this partnership, MCI will have access to Covad's nationwide network, which covers over 1,800 central offices, serving more than 40 million homes and businesses in 96 of the top Metropolitan Statistical Areas (MSAs) in 35 states."[15] Thus, despite some unduly pessimistic claims to the contrary, competition has firmly taken root in the broadband marketplace and it is beginning to flourish.

III. THE COMMISSION SHOULD REJECT CLAIMS THAT THE BROADBAND MARKET IS IN NEED OF MORE REGULATION.

Despite intense competition in the broadband marketplace as described above, AT&T, MCI and others claim that the marketplace is nonetheless in danger of succumbing to some form of "opoly" -- monopoly, duopoly, or oligopoly -- though they cannot seem to settle on which one.[16] At the root of these assertions is the wholly unsubstantiated claim that cable companies

[13] *AT&T Adds DSL Service to Communications Bundle in California*, AT&T News Release (May 11, 2004).

[14] *Covad Partners with AT&T to Offer Bundled DSL and Voice Services in California*, Covad News Release (May 11, 2004).

[15] *Covad Extends Partnership with MCI*, Covad News Release (Sept. 2003).

[16] *See* AT&T Comments at 8 (discussing the "duopoly of cable modem and ILEC-provided DSL service"); MCI Comments at 9 (discussing the "BOC's Monopoly Over the Last Mile"); MCI Comments at 11 (describing the "existing BOC/cable broadband duopoly"); MTCO comments at 2 (discussing the "oligopoly" that will result from the Commission's unbundling rules). MCI's claim that the BOCs have a "monopoly" over the last mile is particularly puzzling given MCI's recognition that cable companies (which maintain complete control over their last

and telephone companies will collude "to maintain prices above competitive levels."[17] And while these commenters are apparently unable to agree on the exact diagnosis of the purported disease that afflicts the broadband market, they are not shy about suggesting a drastic cure: more regulation.

But when subjected to the slightest scrutiny, it becomes quite obvious that these self-serving assertions about an alleged market failure are not supported by any factual evidence. Rather, they are based wholly on speculation on what might or could theoretically occur at some indeterminate point in the future. Indeed, AT&T postulates that cable providers and telephone companies "are *likely* to have the incentive" to behave in anti-competitive behavior because "firms in a duopoly *tend*" to do so.[18] MCI similarly hypothesizes that failing to regulate the alleged cable-telco duopoly carries a risk that consumers will lack choices "in the end."[19] MTCO muses in the abstract about the "higher prices, fewer choices, and poorer service quality" that can occur in an oligopoly.[20]

Entirely absent from this sky-is-falling rhetoric, however, is any factual support to show that the market is failing or consumers are being harmed.[21] Indeed, the only attempt at such factual support comes from AT&T. In what can be charitably described as a blatant misrepresentation, AT&T wrongly suggests that SBC has been abusing its alleged "market

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mile connections) have a nearly two-to-one advantage in broadband subscribers over their BOC competitors. *See* MCI comments at 6-7.

[17] *See* AT&T Comments at 9.

[18] AT&T Comments at 9 (emphasis added).

[19] MCI Comments at iv.

[20] MTCO Comments at 2.

[21] To the contrary, Sprint points to actual evidence -- Verizon's recent decision to offer higher DSL speeds without raising prices -- to support its claim that the "Commission should not be concerned about ILECs failing to respond to the vigorous competition to provide advanced services. . . . Clearly, the market is working efficiently and effectively." Sprint Comments at 3-4.

power" to raise the price of its DSL Internet access service.[22] But exactly the opposite is true -- in response to competitive pressures in the broadband marketplace, SBC has *repeatedly lowered* the price of its DSL Internet access service. In fact, when SBC first introduced its entry-level DSL Internet access service in 1998, the service was priced at $49.95 per month.[23] By mid-2003, SBC had lowered the price of that service to $34.95 per month. And today, SBC's entry-level DSL Internet access service is *just $26.95 per month*.[24] In addition, SBC also offers a higher-speed DSL Internet access service (ranging from 1.5 Mbps to 3.0 Mbps downstream and 384 Kbps upstream) for $39.99 per month, which is several dollars *less expensive* than many typical cable modem service offerings.[25] Thus, AT&T's suggestion that SBC is engaging in any type of behavior that "denies today's consumers the benefits of choice, innovation, and lower prices for broadband" is simply preposterous.[26]

Indeed, affordable broadband services, like those offered by SBC, are precisely what policymakers have been clamoring for since the passage of the 1996 Act. The whole purpose of the Act is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information

[22] AT&T Comments at 9.

[23] This pricing information relates to the lowest promotional rate offered for SBC's entry-level DSL service with speeds ranging from 384 Kbps to 1.5 Mbps downstream and 128 Kbps upstream.

[24] The current rate of $26.95 per month is available when subscribers sign-up for one year of service and purchase the service online or as part of a qualifying bundle of services.

[25] The current rate of $39.99 per month is available when subscribers sign-up for one year of service and purchase the service online or as part of a qualifying bundle of services.

[26] AT&T Comments at 9. As evidence of SBC's alleged price increases, AT&T refers to an *ex parte* letter from its outside counsel in another proceeding, which in turn references an analyst report from Goldman Sachs. *See* Letter from David L. Lawson, Sidley, Austin, Brown & Wood, to Marlene Dortch, FCC, CC Docket Nos. 01-337, 02-33 at 8 n.31 (Feb. 20, 2004). But that analyst report explicitly states that, although SBC changed the pricing of one DSL offer from $26.95 to $29.95, SBC introduced a new DSL offer at the pre-existing $26.95 rate. Thus, while not every change in the price of SBC's DSL Internet access service has been downward since 1998, the critical and undisputable fact here is that SBC has cut the price of that service by nearly 50 percent over the last five years. AT&T's failure to acknowledge this fact is, at best, disingenuous.

technologies and services to all Americans . . . ."[27] And Congress specifically urged the Commission to ensure that its policies fostered the availability of "[a]ccess to advanced telecommunications and information services" in "all regions of the Nation," and that such services are "quality services" offered at "affordable rates."[28]

Further, Chairman Powell has stated that "[u]niversal and affordable access to broadband is vital to the health and future growth of our economy."[29] Commissioner Abernathy has noted the importance of the Commission's efforts to "push competitive, affordable, and universal broadband Internet access to the masses . . . ."[30] And Commissioner Adelstein has observed that "Congress intended all Americans to have access to telecommunications service, and eventually advanced services, at reasonable and affordable rates."[31]

If there was any doubt about the importance of affordable broadband, the President put that to rest when he called for our country to "be aggressive about the expansion of broadband."[32] He recognized that "[i]n order to make sure the economy grows, we must bring the promise of broadband technology to millions of Americans."[33] The President has

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[27] *See* Joint Explanatory Statement of the Committee of the Conference, S. Rep. No. 230, 104th Congress, 2d Sess. 1, 113 (1996).

[28] 47 U.S.C. § 254(b)(1), (2).

[29] *Powell Comments on President's Call for Universal, Affordable Broadband*, FCC News Release (March 26, 2004).

[30] *Section 257 Triennial Report to Congress Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, FCC 03-335, Separate Statement of Commissioner Kathleen Q. Abernathy (released Feb. 12, 2004).

[31] *Commissioner Adelstein Supports Active FCC Role in Promoting Deployment of Basic and Advanced Telecommunications Services to Rural America*, FCC Press Release (Aug. 6, 2003).

[32] *Remarks by the President at the 21st Century High Tech Forum*, Washington, DC (June 13, 2002).

[33] *Remarks by the President at the Economic Forum Plenary Session*, Waco Texas (Aug. 13, 2002).

emphasized, however, that in order for broadband to reach "all corners of the country, it must be affordable."[34]

But just as SBC and other ILECs are fulfilling the goals of the 1996 Act and making affordable broadband service available to millions of Americans, some commenters are suggesting that the Commission should turn back the clock and re-impose unnecessary and affirmatively harmful regulations on our broadband services. In their comments, they ask the Commission to reverse various portions of the broadband relief provided in the *Triennial Review Order*.[35] While they focus on different aspects of that order, their comments share a common theme: more regulation is better.[36] For the most part, the Commission wisely rejected this heavy-handed approach for broadband in the *Triennial Review Order*, and the Commission should not waste its time or scarce resources revisiting the deregulatory aspects of that decision in this proceeding.[37]

Rather, the Commission should continue forward with its efforts to develop a "policy and regulatory framework [that] will work to foster investment and innovation in [broadband] networks by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs."[38] Specifically, the Commission should move as expeditiously as possible to finish the

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[34] *Remarks by the President at the American Association of Community Colleges Annual Convention*, Minneapolis, Minnesota (April 26, 2004).

[35] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*).

[36] *See* Covad Comments at 9-11; MTCO Comments at 7-9. *See also* AT&T Comments at 15-16 (criticizing the *Triennial Review Order*); MCI Comments at 9-11 (criticizing the *Triennial Review Order*).

[37] Moreover, in affirming the relief from broadband unbundling provided in the Commission's *Triennial Review Order*, the D.C. Circuit recognized that there was "very strong record evidence" of "robust intermodal competition from cable providers." *USTA v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004). In fact, the court stated that "even if all CLECs were driven from the broadband market, mass market consumers will still have the benefits of competition between cable providers and ILECs." *Id*.

[38] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 ¶ 5 (2002) (*Wireline Broadband NPRM*).

following wireline broadband proceedings in a manner that satisfies Congress's mandate to "remove barriers to infrastructure investment"[39] and encourages the deployment of broadband networks and services: (1) the *Wireline Broadband NPRM*; (2) the *Non-Dominance NPRM*;[40] and (3) the pending petitions for reconsideration of the *Triennial Review Order*.[41] The swift and fair resolution of these proceedings is absolutely critical to creating a stable regulatory environment that will serve as a foundation for the deployment of the next generation of broadband services across the nation.

Respectfully Submitted,

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[39] *See* Section 706(a) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), reproduced in the notes under 47 U.S.C. § 157.

[40] *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Non-Dominance NPRM*).

[41] *See* SBC Comments at 16-22; Nortel Comments at 8 ("Speedy resolution of these proceedings would be a major positive step in accelerating the deployment of advanced telecommunications capability to all Americans, thereby meeting the objectives of the 1996 Act.").